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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Grow Company, Inc.  
v.  
Biotest Laboratories, LLC

Opposition No. 91150362  
to application Serial No. 76258650  
filed on May 17, 2001

Myron Amer of Myron Amer, P.C. for Grow Company, Inc.

Tish L. Berard of Sullivan Law Group for Biotest  
Laboratories, LLC.

Before Chapman, Bucher and Rogers, Administrative  
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Grow Company, Inc. (a New Jersey corporation)  
has opposed the application of Biotest Laboratories, LLC  
(a Colorado limited liability company) to register on the

Principal Register the mark GROW! for "nutritional supplements" in International Class 5.<sup>1</sup>

Opposer asserts as grounds for opposition that it "is the owner of the trademark 'GROW COMPANY INC.' in special form for, among other things, 'dietary food supplements' in International Class 005" (paragraph 4); that opposer spends substantial amounts of money and effort in promoting its goods, with the result that its "'GROW COMPANY INC.' mark has acquired a secondary meaning in the minds of the public in connection with Opposer and the goods of Opposer" (paragraph 6); and that applicant's mark, when used on or in connection with its goods, so resembles opposer's "previously used mark," as to be likely to cause confusion, mistake, or deception (paragraph 7).

In its answer applicant admits that it seeks to register the mark GROW!; that it filed its application on May 17, 2001; and that "its application states use of the mark 'GROW!' as early as May 1, 1999." Applicant otherwise denies the salient allegations of the notice of opposition.

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<sup>1</sup> Application Serial No. 76258650, filed May 17, 2001, based on applicant's claimed dates of first use and first use in commerce of May 1, 1999 and July 6, 1999, respectively.

The record consists of the pleadings; the file of applicant's application; opposer's testimony, with exhibits, of Dr. Massoud Arvanaghi, its vice president of operations; applicant's testimony, with exhibits, of Tim Allyn Patterson, its Chief Executive Officer; opposer's rebuttal testimony, with exhibits, of Seymour Adler, a self-employed private investigator; opposer's first notice of reliance on various items, including under Trademark Rule 2.122 its Registration No. 1786456 "made of record as Exhibit B in the testimonial deposition of Dr. Massoud Arvanaghi" for the mark shown below



for "dietary food supplements" in International Class 5;<sup>2</sup> applicant's notice of reliance on opposer's responses to applicant's first set of interrogatories, and photocopies of six third-party registrations which include "GROW" in the mark; and opposer's rebuttal notice of reliance on, inter alia, four advertisements placed in Food Product Design magazine, and photocopies of two pages from the Manhattan Telephone Directory.

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<sup>2</sup> Reg. No. 1786456, issued August 10, 1993, Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed. The words "Company, Inc." are disclaimed.

Both parties have filed briefs on the case. Neither party requested an oral hearing.

**Preliminary Matters**

First, the Board notes that opposer did not plead ownership of its Registration No. 1786456 in its the notice of opposition. However, it is clear that this issue was tried with the implied consent of applicant, as applicant made no objection to Dr. Arvanaghi's testimony or exhibits insofar as the testimony addresses opposer's registered

mark, or to the notice of reliance referring to the registration as a testimony exhibit. Accordingly, we hold that the pleadings are considered amended under Fed. R. Civ. P. 15(b) to conform to the evidence, specifically, to include opposer's Registration No. 1786456.

Second, we note that a pleaded registration may properly be made of record in any one of several different ways. See Trademark Rule 2.122(d). In this case, opposer submitted the registration through identification and introduction (as Exhibit B) during the trial testimony of its witness, Dr. Arvanaghi. He testified that opposer is the owner thereof, but he did not specifically testify as to the current status thereof (i.e., that the registration is valid and subsisting). However, applicant did not object to the introduction of opposer's registration into the record (compare Dr. Arvanaghi dep., p. 8; and applicant's brief regarding its objections to other evidence introduced by opposer, pp. 15-27), and did not question the status of the registration. To the contrary, applicant treated opposer's registration as if it were of record. In these circumstances, we find that the validity of opposer's pleaded registration has been stipulated, and said

registration is of record herein. See *Tiffany & Co. v. Columbia Industries, Inc.*, 455 F.2d 582, 173 USPQ 6 (CCPA (1977)); and *Floralife, Inc. v. Floraline International Inc.*, 225 USPQ 683, footnote 6 (TTAB 1984). See also, TBMP §704.03(b)(1)(A) (2d ed. June 2003).

Next, we will determine applicant's objections to opposer's testimony and other evidence. Applicant contends that opposer relied upon certain evidence which is either inadmissible under the Federal Rules of Evidence or was improperly withheld from applicant during discovery; and applicant requests that the material be stricken from the record. The specific items objected to by applicant are listed below:

- (1) Exhibit F and related testimony, Exhibit G and related testimony, and Exhibit H, all from opposer's deposition of Dr. Massoud Arvanaghi;
- (2) items A. I. through A. V. of opposer's rebuttal notice of reliance; and
- (3) numerous portions of the testimony of Seymour Adler, as well as Exhibits 2 and 11.

The Board will rule on the objections seriatim. Of course, with regard to those objections which are overruled, we note that allowing evidence into the record does not necessarily mean that the particular evidence is determinative or even probative of any particular issue.

The weight to be given all evidence and testimony of record is determined by the Board.

Exhibit F to Dr. Arvanaghi's deposition testimony consists of eight of opposer's invoices dated from 1992 through 2000. Applicant objects on the basis that "they contain hearsay and do not appear to be based upon personal knowledge of Dr. Arvanaghi" (as he did not prepare or gather the documents, and he did not testify the documents are kept by opposer in the ordinary course of business). (Brief, p. 21.) Although applicant did not object thereto at the testimony deposition, these particular objections are not waived thereby. See Trademark Rule 2.123(k) and Fed. R. Civ. P. 32(d)(1)(A). See also, TBMP §707.03(c) (2d ed. June 2003). However, we agree with opposer that these invoices are documents kept in the course of a regularly conducted business activity and are admissible as an exception to the hearsay rule under Fed. R. Evid. 803(6). Applicant's objection to Exhibit F and the related testimony of Dr. Arvanaghi is overruled.

Exhibit G to Dr. Arvanaghi's deposition testimony is a letter dated July 26, 2002 from one of opposer's accountants to Dr. Arvanaghi, listing opposer's annual sales figures from 1996 through 2001. Applicant objects

on the basis that opposer is offering the letter for the truth of the matter asserted therein (opposer's asserted annual sales figures), but this letter is hearsay, and is not a business record kept in the course of regularly conducted business. Applicant also argues that the sales figure given for 2001 does not match the sales figure given by opposer in its answer to applicant's interrogatory No. 4(d). Opposer argues that "total exclusion is not warranted ... [because] use by sales is not in dispute" (reply brief, p. 4); and that the document is a "report" by accountants "with knowledge" of a regularly conducted business activity, making it admissible under Fed. R. Evid. 803(6). However, the witness testified that this document was specially prepared based on opposer's attorney's request; and the witness did not testify that the annual sales figures stated in the letter were accurate to his knowledge. Applicant's objection to Exhibit G is sustained, and Exhibit G will not be further considered herein. Although the exhibit is stricken, Dr. Arvanaghi's testimony relating to Exhibit G will not be stricken because it includes his testimony relating to opposer's continuous use both before 1996 and after 2001, which was not questioned by applicant.



Exhibit H to Dr. Arvanaghi's deposition testimony is a metal "tamper proof security seal" bearing the term "GROW" which is affixed to the drums containing opposer's product. (See Arvanaghi dep., p. 23, and opposer's Exhibit E.) Applicant objects to this exhibit on the basis that it was not produced during discovery. (See applicant's interrogatory No. 6 and document request No. 2 and opposer's responses thereto, which are fully discussed later herein.) This metal tag would clearly be included within these discovery requests, but it was not produced by opposer, resulting in unfair surprise at trial. Opposer's assertion that it is admissible because it is depicted in the photograph constituting opposer's Exhibit E in the Arvanaghi deposition, and because applicant made no objection thereto, is not persuasive. While the metal tag is technically visible on one drum in the photograph (Exhibit E), it is not discernable exactly what it is and certainly no words are distinguishable. We sustain applicant's objection to opposer's Exhibit H.

Items A. I. through A. IV. of opposer's rebuttal notice of reliance are four advertisements placed at various times in Food Product Design magazine, and opposer's statement of relevance for each is that it is to rebut applicant's testimony that "there is no

marketing promotion to the public of a contract manufacturer, e.g., Opposer."

Applicant objects on the basis that this material was included in applicant's discovery requests but was not produced by opposer. Applicant's interrogatory No. 6 requests that opposer "identify all marketing and other sales or promotional materials used by you, or which you intend to use, that contain the Mark, including but not limited to packaging and labeling materials"; and applicant's document request No. 2 requests that opposer produce "all documents evidencing the use or intended use of the Mark, including but not limited to, representative marketing materials, packaging materials, product literature, brochures, stationery, promotional documents or other printed materials." Opposer's answers were "Label of Exhibit B which contains the GROW TRADEMARK" and "Exhibit B of the GROW TRADEMARK," respectively. Opposer's Exhibit B attached to its responses to applicant's discovery requests is a photocopy of a label marked with the words "FROM:" and "TO:" as well as the mark GROW COMPANY INC. in the form shown in opposer's registration along with an address, and the wording "For manufacturing or reprocessing use only."

Applicant's interrogatory No. 6 and document request No. 2 clearly asked for marketing and promotional materials, which would include the four advertisements opposer submitted in its rebuttal notice of reliance. Opposer's argument that applicant's remedy was to file a motion to compel is unpersuasive. Because opposer did not indicate in its discovery answers that any other materials were available, but were being withheld by opposer, applicant had no basis for filing a motion to compel. That is, the questions were "asked and answered." See *Weiner King, Inc. v. The Weiner King Corporation*, 615 F.2d 512, 204 USPQ 820, 828 (CCPA 1980); *NASA v. Bully Hill*, 3 USPQ2d 1671, footnote 3 (TTAB 1987); *ERA Corp. v. Electronic Realty Associates, Inc.*, 211 USPQ 734, 737 (TTAB 1981); *Autac Inc. v. Walco Systems, Inc.*, 195 USPQ 11, footnote 2 (TTAB 1977); and TBMP §527.01(e) (2d ed. June 2003).

Opposer also argues that these advertisements were properly offered under Trademark Rule 2.122(e) as printed publications available to the relevant public. This is likewise unpersuasive because even if material is of the type which could be made of record under a notice of reliance, that does not negate that it was not produced

during discovery when requested, resulting in unfair surprise to the adverse party at trial.

Applicant's objection to items A. I. through A. IV. in opposer's rebuttal notice of reliance is sustained, and they will not be further considered herein.

Item A. V. in that notice of reliance consists of photocopies of two pages from the Manhattan (NY) telephone directory (one showing listings for "General Nutrition Center" and the other showing listings for various entries of "Vitamin Shop Inc," "Vitamin Shoppe Inc" etc.) offered to rebut applicant's denial of likelihood of confusion from contemporaneous sales in retail stores. Applicant objects thereto on the basis that opposer's statement regarding the relevancy does not actually identify why these pages are relevant and thus, they should be stricken as irrelevant. Opposer correctly asserts that these photocopied pages from the telephone directory are admissible under Trademark Rule 2.122(e) as printed publications available to the relevant public. The fact that opposer's statement of relevancy is not a model of clarity does not render the material inadmissible. Applicant's objection to this material is overruled.

Applicant objected to much of the testimony of opposer's witness Seymour Adler (set forth by applicant in chart form on pages 16-17 of its brief) and two exhibits (Nos. 2 and 11) on the basis that those portions of the testimony and those two exhibits all refer to statements made by third parties and are inadmissible as hearsay. (For example, applicant objects to portions of the testimony and evidence because the witness refers to telephone conversations with individuals such as Todd or Ron or "other people" and statements made by third parties over the telephone.) Applicant contends that the material is improperly "being offered in evidence to prove the truth of the matter asserted therein, i.e., that none of the trademarks contained in the [third-party] Registrations are in use." (Brief, p. 18.) Opposer essentially argues that the testimony is admissible because the witness, Seymour Adler, is qualified to testify as an expert under Fed. R. Evid. 702.

There is nothing in the record to support opposer's conclusory statement that a self-employed private investigator is an expert under Fed. R. Evid. 702. In fact, we find that a private investigator is not an expert involving issues relating to the registrability

and use of third-party trademarks. Nonetheless, we overrule applicant's objection to this testimony and the exhibits because the testimony and evidence is not hearsay in that the witness was an actual party to the various conversations, and he may testify to what others said to him as part of his testimony regarding whether he was able to confirm or refute use of the marks in the third-party registrations. All of Seymour Adler's testimony and the exhibits thereto were considered by the Board in reaching the decision herein. Of course, his testimony regarding statements made to him by others does not prove the truth of the matters stated by the other people.

**The Parties**

Opposer, Grow Company, Inc., is a small company (17 employees) that manufactures food and nutritional supplements. The goods are sold to opposer's customers in bulk (i.e., in about 110 pound drums). Opposer sells its products to nutritional supplement houses who repack the goods in smaller packages and then sell the product to retail stores under their own house mark. Opposer also sells its food and nutritional supplements to (i) pharmaceutical houses which use the trace minerals in different formulations of their own products; (ii)

food companies which use opposer's goods for fortification, natural coloring and natural flavoring in their own products; and (iii) the cosmetic industry which uses them as raw material to manufacture their finished cosmetic products.

Opposer claims to have created and developed the mark GROW COMPANY INC. in early December 1980 (opposer's answer to applicant's interrogatory No. 2). Dr. Arvanaghi, opposer's vice president of operations, testified that opposer has used the mark continuously since at least 1991 (Arvanaghi dep., pp. 11-12, 32). During this time, opposer is not aware of any instances of actual confusion. (Opposer's answer to applicant's interrogatory No. 16.)

Applicant, Biotest Laboratories, LLC, is not a manufacturer, but is a "brand company" whose "basic function is marketing." (Patterson dep., p. 6.) Applicant characterizes its business as follows (Patterson dep., p. 14):

What we do here is the creative element of sports nutrition. ... A minor part of what our business is is the GROW brand where it would be protein powders. Because of that, the way we run our operation is highly weighted on the R & D side. So we will create individual ingredients, none of which is in GROW, but that's typically what we do is we put formulas together and

test those formulas and then alter them based upon our findings and retest them until we find that we get an -- we can accomplish exactly what our objectives are on the product. Then we go to a contract manufacturer and give them very tight specifications for what we want made for us. Sometimes we do provide individual ingredients.

Applicant does not provide retailers with the identity of its contract manufacturers. (Patterson dep., pp. 14-15.)

Applicant began using its GROW! mark for nutritional supplements in May 1999 and its use has been continuous since then. The goods are sold in two or three pound bottles or containers. Applicant sells this product directly to consumers, to retail stores (such as GNC and Vitamin Shoppe), and to distributors who sell to retail stores. It pursues sales through a sales force, via "advertisements in a few of the magazines" (Patterson dep., p. 8), and through its web site.

Applicant is not aware of any instances of actual confusion between its mark and that of opposer. (Patterson dep., p. 10.)

**Priority**

In view of opposer's ownership of a valid and subsisting registration for its GROW COMPANY INC. and design mark, the issue of priority does not arise in this



opposition proceeding. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272, at footnote 6 (CCPA 1972); and *Carl Karcher Enterprises, Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). Moreover, the record establishes opposer's use of its mark prior to applicant's first use in May 1999.

**Likelihood of Confusion**

We turn now to consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In *re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods

[and services] and differences in the marks." ). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We point out that the Board is an administrative tribunal that determines only the right to register marks. See Section 17 of the Trademark Act, 15 U.S.C. §1067. See also, TBMP §102.01 (2d ed. June 2003). As the Court of Appeals for the Federal Circuit stated in the case of *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990):

The issue in an opposition is the right of an applicant to register the mark depicted in the application for the goods identified therein. The authority is legion that the question of the registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Based on the record before us, we find that confusion is likely.

Turning first to a consideration of the parties' respective goods, in Board proceedings, as explained above, the issue of likelihood of confusion must be

determined in light of the goods as identified in the involved application and registration and, in the absence of any specific limitations therein, on the presumption that all normal and usual channels of trade and methods of distribution are or may be utilized for such goods. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, supra; *Canadian Imperial Bank of Commerce, N. A. v. Wells Fargo Bank*, 811 F.2d 490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); and *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

The goods involved herein are opposer's "dietary food supplements" and applicant's "nutritional supplements." As identified, we find that these goods are substantially identical, and applicant has not seriously contended to the contrary. Our primary reviewing Court has stated that "when marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Inasmuch as neither applicant's application nor opposer's registration includes any type of restriction as to trade channels or purchasers, we must presume in

this administrative proceeding that the involved goods are sold in all normal channels of trade to all usual classes of purchasers for such goods. See Octocom Systems Inc. v. Houston Computers Services Inc., supra; and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, supra. Thus, even if opposer only sells its product as an ingredient for pharmaceuticals, foods, and cosmetics and/or in bulk to nutritional supplement houses for re-packaging, and applicant sells its product directly to consumers and to retail stores, there are no such limitations in either applicant's or opposer's identifications of goods. We find that the channels of trade and the classes of purchasers for the parties' goods, as identified, must be construed as encompassing all normal trade channels and classes of consumers, for purposes of determining whether there is a likelihood of confusion.

Turning next to a consideration of the similarities/dissimilarities of the marks, it is well settled that marks must be considered in their entirety because the commercial impression of a mark on an ordinary consumer is created by the mark as a whole, not by its component parts. This principle is based on the common sense observation that the overall impression is

created by the purchaser's cursory reaction to a mark in the marketplace, not from a meticulous comparison of it to others to assess possible legal differences or similarities. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §23:41 (4th ed. 2001). See also, Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980). That is, the proper test in determining likelihood of confusion does not involve a side-by-side comparison of the marks, but rather must be based on the similarity of the general overall commercial impressions engendered by the involved marks.

Our primary reviewing Court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this case, both applicant's and opposer's marks share the dominant term GROW. Applicant has added a punctuation mark ("!") to the word "GROW," and opposer's mark includes the visually smaller and disclaimed words "COMPANY INC.," along with a design feature in the nature of a line encircling the words except where the line would intersect with the large letter "G" in the upper left hand corner. However, these differences do not serve to distinguish the marks. The only word in applicant's mark is GROW and the dominant word and feature of opposer's mark is GROW. Moreover, in regard to opposer's mark, the word "GROW" is the first and larger term which is most likely to be impressed upon the mind of a purchaser and be remembered by the purchaser. See *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).

The connotation created by both marks, GROW! and GROW COMPANY INC. and design, could be similar in that the word "GROW" connotes flourishing or developing, presumably from using the involved goods.

Although the parties' marks are not identical, when considered in their entireties, we find the respective marks are similar in sound, appearance, connotation and commercial impression. See *In re Azteca Restaurant*

Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999). Their differences, even if recognized, may be attributed by consumers to one source of goods having variations on a theme, with one mark being seen as a complete company name, and the other being an emphatic shortening of the company name. Their contemporaneous use, on and in connection with these substantially identical goods, would be likely to cause confusion as to the source or sponsorship of such goods. See *Cunningham v. Laser Golf Corp.*, supra.

Applicant argues that there are third-party registrations of marks which include the word GROW and which are for the same or related goods as those involved herein. As evidence thereof, applicant submitted its notice of reliance on six third-party registrations, stating they were relevant "to show that consumers of nutritional supplements are able to distinguish between the various supplements utilizing the word 'grow' in their marks." Specifically, the six third-party registered marks are MASSGROW, BODY GROW, Z-GROW, POWER GROW, GROWFORM, and FLORA GROW, all with different owners.

It is well settled with regard to the weight to be given to third-party registrations, that these

registrations are not evidence of use of the marks shown therein in the marketplace or that the public is familiar with them. Thus, we cannot assume that the public has become able to distinguish between them. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Moreover, there are only a minimal number of third-party registrations. In fact, one of the six third-party registrations (FLORA GROW) is for unrelated goods-- "bacterial supplements for the human intestinal tract." Overall, the third-party registrations are of limited probative value to support applicant's position. See *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995).

To whatever extent applicant is asserting that this evidence relates to the du Pont factor of the number and nature of similar marks in use, as stated above, third-party registrations do not establish use. We are aware that opposer's rebuttal witness, Seymour Adler, testified that he spoke with a person at Great Earth Companies, Inc. who stated they use their mark Z-GROW for a vitamin particularly for body building (the registration covers "dietary and nutritional supplements"); and that it is



sold through 2000 Great Earth Stores. There was no testimony as to the specific title held by, the authority of, or the knowledge (particularly with regard to use of the mark Z-GROW) of the person at Great Earth to whom the witness spoke. Thus, we find that the testimony of Mr. Adler is not sufficient to establish use of the mark Z-GROW. Even if we found that it established one third-party use of a "GROW" mark, it is not, by itself, sufficient evidence to establish that opposer's mark is weak. In any event, the commercial real world does not have to be a completely clean slate in order for a trademark owner to prevail in a proceeding regarding registrability.<sup>3</sup>

Although opposer argues that its mark is strong, it is clearly not proven in this record. (We note that even if we had considered opposer's Exhibit G to the Arvanaghi deposition -- opposer's accountant's letter to opposer setting out six years of sales figures -- it would not alter our holding on this factor.)

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<sup>3</sup> In an analogous situation, but relating to a "family" of marks, the Court of Customs and Patent Appeals stated long ago that "[a]s a matter of logic it would seem to us that if opposer has a family of six marks all starting with the non-descriptive word 'Golden,' it still has that family notwithstanding there may be some others using the same word to some undisclosed extent." *Motorola, Inc. v. Griffiths Electronics, Inc.*, 317 F.2d 397, 137 USPQ 551, 553 (CCPA 1963).

The absence of any instances of actual confusion by consumers relating to opposer's mark and applicant's mark used on the involved goods is not a meaningful factor to our decision. The absence of confusion is not surprising given the relatively short duration of use by applicant of its mark, and/or that the current channels of trade are largely different. This factor is of little weight in view of the manner in which we must analyze the issue of likelihood of confusion (i.e., the identifications of goods in the registration and application, which lack any restriction as to channels of trade or purchasers of the goods in this case). Moreover, the test is not actual confusion, but likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

On balance, and considering all of the evidence on the relevant du Pont factors, and giving each such factor its appropriate weight in the circumstances of this case, we find that confusion is likely between applicant's mark GROW! and opposer's mark GROW COMPANY INC. and design when used on these substantially identical goods. See generally, *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445

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(TTAB 1986, amended 1987); Chemical New York Corp. v. Conmar Form Systems, Inc., 1 USPQ2d 1139 (TTAB 1986); In re Logue, 188 USPQ 695 (TTAB 1975); and In re Honeycomb, Inc., 162 USPQ 110 (TTAB 1969).

While we have no doubt in this case, if there were any doubt on the question of likelihood of confusion, it must be resolved against the newcomer as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997); and In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

**Decision:** The opposition is sustained and registration to applicant is refused.